MAY 14 1945

No. 1267 74

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED FREIGHTWAYS, INC., ET AL., APPELLANT

vs.

PIERCE AUTO FREIGHT LINES, INC., LOS ANGELES-SEATTLE MOTOR EXPRESS, ANGELO COLLETTI, PACIFIC MOTOR TRUCKING COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of Oregon

Civil Action No. 2340

PIERCE AUTO FREIGHT LINES, INC., A CORPORATION; LOS ANGELES-SEATTLE MOTOR EXPRESS, A CORPORATION; ANGELO COLLETTI, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF COLLETTI FAST FREIGHT; PACIFIC MOTOR TRUCKING COMPANY, A CORPORATION; AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION; CONSOLIDATED FREIGHTWAYS, INC.; AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., INTERVENERS

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The Interstate Commerce Commission, the United States, Consolidated Freightways, Inc., and Oregon-Nevada-California Fast Freight, Inc., defendants-appellants, respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

646772—45——1

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a [Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 41(28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C., Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938].

U. S. C., Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 345 [Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938.]

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which is Invovled.

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED.

The decree sought to be reviewed was entered on February 6, 1945. The petition for appeal was presented and allowed on ----------, 1945, together with an assignment of errors.

D. NATURE OF THE CASE AND OF RULINGS BELOW.

This is an appeal from final decree of the District Court of the United States for the District of Oregon entered February 6, 1945, setting aside and suspending an order of the Interstate Commerce Commission dated March 1, 1943, as entered in the cases of *Consolidated Freightways, Inc., Extension Application*, No. MC–42487 (Sub-Nos. 15, 18, 19 and 20), and *Oregon-Nevada-California Fast Freight, Inc., Extension Application*, No. MC–9115 (Sub-No. 1), authorizing certain motor carrier operations described in both applications, and under which certificates were issued, evidencing said authority, on September 7 and September 15, 1943, respectively, the said certificates being suspended by said Court decree.

The report of March 1, 1943, found that both Consolidated Freightways and Oregon-Nevada-California Fast Freight were fit, willing, and able to perform the service proposed in their respective applications, to the extent such service was authorized in said report and that future public convenience and necessity required said services. The order of the same date provided for carrying out of the decision by granting certificates, which were issued on

September 7, 1943, to Consolidated, and on September 15, 1943, to O–N–C. The report and order of March 1, 1943, resulted from filing of applications by the two said carriers, seeking extension of authority for each, as motor common carriers of general commodities, so as to permit through line service by each between San Francisco, Calif., and Portland, Oreg. In effect these applications proposed the through service as a substitute for a joint similar service between the same points, under their previous interchange arrangement, as conducted under certificates issued without question, which generally authorized such service by Consolidated between Portland and Medford, Oreg., and by O–N–C between Medford and San Francisco.

Under provisions of Section 205 (a) of the Interstate Commerce Act, the two applications were referred to separate Joint Boards, and separate hearings in each case were held, each of said Joint Boards failed to agree upon a recommended report and order, and both cases were therefore referred to a Commission examiner, who submitted separate recommended reports and orders in each case. Thereafter Division 5 of the Commission entered the report and order of March 1, 1943, both cases being considered and decided in one report and order because of the relation between the two applications. Appellee carriers were protestants against both applications, and filed petitions for reconsideration and rehearing of the order of March 1, 1943, said petitions being denied by the entire Commission on August 2,

1943. At the two separate Board hearings a number of witnesses testified, some in both cases. A considerable portion of this duplicate evidence, when taken in one case, was incorporated in the record of the other, by stipulation of the several parties to the hearings. This was done to save delay in offering the same evidence a second time. The two records thus compiled were considered separately in the one report of March 1, 1943, which decided both cases. The report carefully analyzed the evidence of each record as relating to the particular applicant concerned, and avoided consideration of one application as involving evidence in the record of the other. The complaint alleges, and the lower court sustained the allegation, that the report does intermingle the evidence in the two records, and bases findings as to one applicant upon the record of the other. Neither the complaint nor the Court opinion points to any particular portion of the evidence as being so intermingled, and the Court even recognizes that evidence from the record of each proceeding supports the report comments, as to the particular applicant involved. Appellants do not understand that evidence from one record was used to support findings as to the other.

There is an abundance of evidence in each case to support the separate findings as to each. Much of this evidence, in both cases, was offered by shippers and other witnesses representing public interests who showed the proposed service to be more efficient, saving in time of deliveries, and otherwise desirable.

A number of such witnesses testified identically in both cases, and some of this taken in one case was incorporated, by stipulation, in the other. Without agreement of all parties, and there was no such agreement, the two applications could not be considered jointly. Of necessity they were considered and decided separately, and where there is supporting evidence for each, as here, it would have been useless to consider the evidence in either case as supporting the other.

The two applicants had in the past, under authority previously granted, operated between San Francisco and Portland by an interchange arrangement at Medford. They transported, under that arrangement, the bulk of traffic between these two industrial centers, some of which had origin or destination in eastern Washington and Oregon. In effect the separate applications proposed a through service by each carrier between these points, requiring new authority for one from Medford to San Francisco, and for the other from Medford to Portland. That authority would enable each carrier to operate through traffic all the way between these points, saving delay and expense of interchange. Also the authority granted one applicant, Consolidated, provides a new direct service to points in eastern Washington-Oregon and San Francisco, an area not previously so served. The report found that this through service would save a number of hours in time of delivery, as compared with the previous interchange service, or with service otherwise available, and would provide a

better service from some intermediate points, and a more efficient transportation with better equipment. The findings, as to each applicant, are supported by evidence offered by shippers and representatives of business organizations. This appears to clearly conform to statutory requirements, under Section 207 (a) of the Interstate Commerce Act, as to public convenience and necessity.

The report of March 1, 1943, contains specific and separate findings, as to each applicant, that each is fit, willing, and able to perform the service proposed by each, and that present and future public convenience and necessity require the service authorized separately for each carrier. These findings are based upon evidence considered separately, in the body of the report, as taken from the separate record in each case. There can hardly be a question that evidence was substantial in both cases.

Hearings were closed on or about October 29, 1940, with report and order here involved entered March 1, 1943. The intervening time was occupied by Joint Board consideration, reference to and consideration by an examiner after failure of Boards to agree, filing of examiner's proposed report and consideration of exceptions thereto, the filing and consideration of briefs by the large number of parties concerned, and the hearing of oral arguments, all time consuming and necessary procedure. Complaint alleges, and is sustained by the Court opinion, that the record upon which the order was entered, is stale and in view of changed conditions because of the war emergency,

should be reconsidered under present conditions. But the result of the changed conditions due to the war was to increase traffic, with consequent increase of public interest in the more efficient and expedited service authorized. This question has been so clearly decided by the courts, including the Supreme Court, as to require no further comment, in order to show error of the court below in this respect. *U. S., et al.* v. *Northern Pacific R. Co.*, 288 U. S. 490; *I. C. C.* v. *Jersey City*, 322 U. S. 503; *North Coast Transportation Co., et al.* v. *U. S., et al.*, 54 F. Supp. 448, affirmed by Supreme Court October 9, 1944 (No. 274, unreported).

Although the question had not been previously presented in Commission proceedings, in complaint allegations, or court arguments, opinion of the lower court holds, and is incorporated as one of its findings, that the two separate applications involved presented a question of whether any through line operation between San Francisco and Portland should be allowed and, if so, to which one of the two separate applicants it should be granted. Each applicant filed a separate application, which were heard, considered, and decided by the Commission separately. Under statutory provisions applicants for such a certificate are entitled thereto, upon proof that they are fit, willing, and able to perform the proposed service, and that public convenience and necessity require such service. Filing and consideration of such an application constituted notice, in itself, that if such proof is offered, the Commission shall issue the authority applied for.

The Court has injected a new question, not before presented or urged by applicants, protestants, or their respective counsel, either before the Commission or to the Court, that the two applications represented some sort of contest between these applicants, as to which one might be granted the authority which both sought. To have so considered the two applications would have required consolidation of the two applications, with consequent comparison of the evidence in one case with that of the other, intermingling of the two records and a joint, rather than a separate, finding and decision by the Commission thereon. The statutes make no provision for any such joint consideration, but obviously requires each application to stand upon its own record and it would have been clear error on the part of the Commission, had the Commission decided either case upon any other basis than the evidence which the particular applicant submitted to support its claim. No agreement of parties permitted consideration other than that provided by the statute. This holding of the lower court erects a new standard for the granting of certificates, different from and in addition to that which the statute provides. Strangely the Court opinion and findings, without identifying the particular evidence involved, held that the two cases were considered as consolidated, and evidence of one record used to support general findings in respect to both. Apparently the lower court conceives that a decision in two separate cases in one report or decree, a common practice in both Interstate Commerce Commis-

sion and court procedure, to be, in itself, evidence of consolidation and joint consideration of the two cases. The lower court, on the one hand, would require complete separation of the Commission consideration, even to decision in separate reports, and on the other hand, would require a consolidated consideration of both of them, in order to decide whether one or the other of the two applications should be granted. These conflicting rulings of the lower court would result in utter confusion to administrative process necessary to the application of the statutory provisions.

The lower court has here substituted its judgment for that of the Commission, upon the administrative question as to the ability of one of the applicants to perform the proposed service, and as to public convenience and necessity requirements of the proposed services of both applicants, without reference to the substantiality of the evidence which separately supports each. The opinion plainly holds that the court, and not the Commission, has the authority to make such final decisions. This is contrary to previous court decisions.

The questions presented by this appeal are substantial. They involve interpretation and application of Section 207 (a) and of the national transportation policy, as stated in the Interstate Commerce Act, and authority of the Commission thereunder, to adequately and properly administer those acts. If allowed to stand the decision of the lower court would avoid enforcement of principles already established by the Supreme Court, and would seriously

disturb, if not destroy, previously recognized Commission authority to decide, upon the basis of substantiality of evidence, whether a proposed transportation service is or is not required by public convenience and necessity, and, in effect, would place that administrative burden upon the courts. Since the decision appears contrary to well recognized principles of judicial review in such cases, and would be contrary to Supreme Court decisions in similar cases, it is important that this decision be reviewed.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal

Manufacturers Ry. Co. v. *U. S.*, 246 U. S. 457.

Louisiana & Pine Bluff Ry. Co. v. *U. S.*, 257 U. S. 114.

Virginian Ry. Co. v. *U. S.*, 272 U. S. 658.

Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. 420.

Chesapeake and Ohio Railway Co. v. *U. S.*, 283 U. S. 35–41.

U. S., et al. v. *Northern Pacific R. Co.*, 288 U. S. 490.

U. S. v. *Louisiana*, 290 U. S. 70.

Florida v. *U. S.*, 292 U. S. 1.

Mississippi Valley Barge Co. v. *U. S.*, 292 U. S. 282.

Rochester Tel. Corp. v. *U. S.*, 307 U. S. 125.

U. S. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

I. C. C. v. *Jersey City*, 322 U. S. 503.

North Coast Transportation Co., et al. v. *U. S., et al.*, 54 F. Supp. 448, affirmed per curiam by the Supreme Court, October 9, 1944, Nos. 274, 275, October Term, 1944 (unreported).

F. OPINION AND DECREE OF THE DISTRICT COURT

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and the final decree here sought to be reviewed, and of order staying effect of decree pending this appeal.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

David O. Mathews,
DAVID O. MATHEWS,
Special Assistant to the Attorney General.

Allen Crenshaw,
ALLEN CRENSHAW,
Attorney,
Interstate Commerce Commission.

Donald A. Schafer,
DONALD A. SCHAFER,
Atty. for Consolidated Freightways, Inc.,
803 Public Service Bldg., Portland, Ore.

Edward M. Berol,
EDWARD M. BEROL,
Atty. for Oregon-Nevada-California Fast Freight, Inc.,
465 California St., San Francisco, Cal.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

[Endorsed: Filed April 5, 1945.]

(Filed Feb. 6, 1945)

In the District Court of the United States
for the District of Oregon

No. Civil 2340

PIERCE AUTO FREIGHT LINES, INC., A CORPORATION; LOS ANGELES-SEATTLE MOTOR EXPRESS, A CORPORATION; ANGELO COLLETTI, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF COLLETTI FAST FREIGHT; PACIFIC MOTOR TRUCKING COMPANY, A CORPORATION; AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

INTERSTATE COMMERCE COMMISSION; CONSOLIDATED FREIGHTWAYS, INC.; AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., INTERVENERS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on the 28th day of April, 1944, before the Honorable Curtis D. Wilbur, Circuit Judge, the Honorable James Alger Fee, District Judge, and the Honorable Claude McColloch, District Judge, all the parties thereto, plaintiffs, defendant and interveners, appearing therein, and the record before the Interstate Commerce Commission and the order of said Commission to enjoin which order this action was brought all having been submitted, and the parties through their respective counsel having argued the facts, orally and upon written briefs, and the said Court having duly

considered said record, said arguments and said briefs, and thereupon having become fully advised and thereafter having made, entered and filed herein its opinion dated September 20, 1944, and now being fully advised in the premises, does hereby make and enter the following as and for its

FINDINGS OF FACT

I

Plaintiff Pierce Auto Freight Lines, Inc., is an Oregon corporation with its principal office and place of business in the State of Oregon. It is engaged in the transportation of general commodities for hire in interstate and foreign commerce as a common carrier by motor vehicle over U. S. Highway 99, 99–E, 99–W, and connecting highways and over alternate routes between Portland, Oregon, and San Francisco, California, serving all intermediate points. Said plaintiff is a motor carrier, as defined by the Motor Carrier Act 1935, as amended, is subject to the jurisdiction of the Interstate Commerce Commission, and holds an appropriate certificate from said Commission duly authorizing it to conduct said transportation business over said route.

II

Plaintiff Los Angeles–Seattle Motor Express is a Washington corporation, with its principal place of business in Seattle, Washington. Plaintiff Angelo Colletti is an individual doing business under the assumed name and style of Colletti Fast Freight. Said last two named plaintiffs are engaged in the

business of transporting general commodities for hire in interstate and foreign commerce by motor vehicle as common carriers over U. S. Highways 99, 99–E, 99–W, and connecting highways, and over alternate routes between Seattle, Washington, and Portland Oregon, on the one hand and San Francisco, California, on the other hand. Said plaintiffs are motor carriers as defined by the Federal Motor Carrier Act 1935, as amended, are subject to the jurisdiction of the Interstate Commerce Commission and hold appropriate certificates from said Commission duly authorizing them to conduct said common carrier business over the highways aforesaid.

III

During all times mentioned herein prior to September 30, 1942, Pacific Truck Express was an Oregon corporation, with its principal place of business in Portland, Oregon, and was engaged in the transportation of general commodities for hire in interstate and foreign commerce by motor vehicle as a common carrier over U. S. Highways 99, 99–E, 99–W, and connecting highways, and over alternate routes between Portland, Oregon, and San Francisco, California, serving all intermediate points. Effective December 30, 1942, the said Pacific Truck Express was lawfully merged into Plaintiff Pacific Motor Trucking Corporation, a California corporation, with its principal place of business in San Francisco, California, and the Interstate Commerce Commission by appropriate order entered December 29, 1942, authorized the merger of the operating rights and

properties of Pacific Truck Express and the plaintiff Pacific Motor Trucking Company, and ever since December 30, 1942, plaintiff Pacific Motor Trucking Company has been and is now the successor in interest of said Pacific Truck Express with respect to all rights and interests of said Pacific Truck Express which are involved in this litigation. Said Pacific Truck Express was and plaintiff Pacific Motor Trucking Company is a motor carrier as defined by the Federal Motor Carrier Act of 1935, as amended, and as such was and is subject to the jurisdiction of the Interstate Commerce Commission, holding an appropriate certificate or certificates from said Commission duly authorizing the common carrier business above mentioned over the aforesaid route.

IV

Plaintiff Pacific Southwest Railroad Association is a voluntary association embracing in its membership the Class I railroads serving the Pacific Southwest, including, among others, the Southern Pacific Company. The principal place of business of said association is San Francisco, California. Southern Pacific Company is a railroad as defined by the Interstate Commerce Act, as amended, and is engaged, among other things, in the operation of a common carrier railroad extending between Portland, Oregon, and San Francisco, California. Said line of railroad parallels generally the highway routes above describes and serves in large part the points and places along and upon said highways routes.

V

The intervener, Consolidated Freightways, Inc., hereinafter called "Consolidated," is a corporation which operates as a common carrier of commodities in interstate and foreign commerce by motor vehicle in many states, including the states of California and Oregon, including a route between Twin Falls, Idaho, and San Francisco, California, through Oakland, Sacramento, and Roseville, California. Intervener Oregon-Nevada-California Fast Freight, Inc., hereinafter called "O.-N.-C.," is a corporation engaged in transportation of commodities in interstate and foreign commerce by motor vehicle in the States of Oregon and California, with its principal route between San Francisco, California, and Medford, Oregon, through Sacramento and Weed, California.

VI

This action was brought against the United States of America under the Act of Congress approved October 22, 1913, to enjoin, set aside, and annul a certain order entered by the Interstate Commerce Commission, hereinafter called the "Commission," on the 1st day of March, 1943. Said order, dated March 1, 1943, is hereinafter called "the Commission's order." The Commission's order was based upon certain findings of fact and conclusions of law, included within a written Report rendered by a majority of a division of the Commission, administratively known as Division No. 5, and said Report

was a part of the record before the court. The action was also brought to set aside certain Certificates of Public Convenience and Necessity issued by the Commission to Consolidated and O.-N.-C. upon the 7th and 15th days of September, 1943, respectively, as described in the Commission's order.

VII

The Commission's order and the Certificates hereinbefore referred to purport to grant to Consolidated, among other operating rights, the right to transport general commodities in interstate and foreign commerce between San Francisco, California, and Klamath Falls, Oregon, via U. S. Highways 40, 99–W, 99–E, 99, and 97, and between San Francisco, California and Medford, Oregon, via U. S. Highways 40, 99–W, 99–E, and 99. Said order and Certificates purport to grant to O.-N.-C., among other operating rights, the right to transport general commodities in interstate and foreign commerce between Medford, Oregon, and Portland, Oregon, over U. S. Highways 99, 99–E, and 99–W; also from Medford, Oregon, to Portland, Oregon, over U. S. Highways 99 and 99–W, Oregon Highway 2 and Oregon Highway 10; also between Klamath Falls, Oregon, and Goshen, Oregon, over U. S. Highway 97, and Oregon Highway 58.

Such proposed operations are and will be directly competitive with the operations of plaintiffs between numerous points and places.

VIII

Consolidated filed the applications which were considered and determined by the Commission in its

said Report and in the Commission's order in January and May, 1940, and O.-N.-C. filed its application, which was likewise considered and determined by the Commission in its said Report and in the Commission's order, in January, 1940.

The applications of Consolidated were heard before Joint Board No. 5, and the applications of O.-N.-C. were heard before Joint Board No. 11, commencing July 8, 1940. The plaintiffs herein, among others, appeared at said hearings, as they had the lawful right to do, as protestants. The two hearings were separate, and separate records were made in each, and they were never consolidated. The two hearings were conducted at the same place, but testimony was taken in one proceeding and thereafter testimony was taken in the other proceeding. The parties to these two proceedings were not identical. A substantial amount of testimony was stipulated from one record into the other record, and such testimony was physically incorporated into the record in which the stipulations were made. The two hearings were recessed from time to time and the separate records in each proceeding were closed on October 28, 1940.

Neither of the Joint Boards could agree upon the conclusions or recommendations which should be made to the Commission, and the separate records were thereafter referred to an Examiner of the Commission who made separate recommendations as to each. The recommendations of the Examiner in each instance were that the application should be wholly denied.

Each applicant, Consolidated and O.-N.-C., filed exceptions separately to the recommendations of the Examiner and thereafter the plaintiffs herein, in their capacity as protestants, filed replies to such exceptions separately in each proceeding.

Thereafter and on March 1, 1943, the Report aforementioned was prepared by Division No. 5 of the Commission, consisting of Commissioners Mahaffie, Rogers, and Patterson, and it was held and determined in said Report, Commissioner Rogers dissenting, that both applications should be granted. The Commission's order was thereafter entered granting both applications in the same order.

On April 6, 1943, protestants, in conformity with the rules of the Commission, filed a petition with the Commission for reconsideration and rehearing upon the ground that new evidence showed a substantial change in transportation conditions since the closing of the records, including matters resulting from the war emergency, and petitioned that the Certificates authorizing the operations be held in abeyance pending rehearing, or, in the alternative, that the Report of Division No. 5 be reconsidered and reversed and the applications be denied.

On August 2, 1943, the said petition for reconsideration was denied by the whole Commission without any opinion or statement of reasons therefor. In September, 1943, Certificates of Public Convenience and Necessity authorizing the operations by Consolidated and O.-N.-C. were issued separately to Consolidated and O.-N.-C. by the Commission.

This action was commenced January 13, 1944, hearing was held April 28, 1944, and final briefs filed June 19, 1944.

IX

The whole basis of the original proceedings before the Joint Boards was the question of whether any through-line operation between San Francisco and Portland should be allowed and, if so, which one of the two separate applications. No notice was given to plaintiffs, or to other protestants, or to the general public, or to the witnesses who testified before the Joint Boards to the contrary. The records upon which the Commission's order and the Report of Division 5 are based were not made upon the basis that two through-line operations might be allowed. There was no suggestion to anyone that such a result was possible until the Commission's order was served upon the interested parties.

The Commission's order and the certificates of Public Convenience and Necessity issued to Consolidated and O.-N.-C. aforesaid authorize both Consolidated and O.-N.-C. to engage in competition with the existing lawful operations of plaintiffs between numerous points and places.

X

The Commission considered the separate records as though the case was a consolidated one. Evidence which appeared only in one record was used by the Commission to support general findings in the Report concerning both Consolidated and O.-N.-C.

In each proceeding embraced within the Report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record therein was drawn upon and considered by the Commission. The findings and conclusions in the separate proceedings are so commingled in the single report as to make it impossible to determine therefrom which record gives support to them.

XI

There is no evidence in the records to support the Commission's finding that the present and future public convenience and necessity require both the operations.

XII

The Commission failed to find, and there was no evidence in either record to support such a finding, that each applicant was separately capable of equipping, maintaining, and conducting the proposed operation in the face of competition from the other.

XIII

The Commission failed to find, and there is no evidence in either record to support such a finding, that Consolidated is adequately equipped to establish and maintain the proposed through-line operations under any conditions.

XIV

The Commission's Report fails to disclose that it gave any consideration to the possibility of adverse effect upon any plaintiff of the institution of two

through-line competitive operations between San Francisco and Portland.

XV

No evidence was offered or submitted by any party nor requested or taken by the Commission or by said Joint Boards as to the rights and duties of any plaintiff or the effect upon the rights, duties, or property of any plaintiff of the institution of two through-line competitive operations between San Francisco and Portland. And no plaintiff had a reasonable or fair opportunity to anticipate the necessity for the submittal of evidence as to such effect upon plaintiffs' rights, duties, and property.

XVI

Many witnesses representing the shipping and receiving public appeared at said hearings and testified on behalf of Consolidated, O.-N.-C. and the protestants (including plaintiffs) and on behalf of the public generally. Neither such witnesses nor the general public had any notice prior to the said hearings, or at any time before the Commission's order was issued, that it was possible or probable that two through-line operations in competition with each other and with the plaintiffs and other existing transportation agencies might be authorized by the Commission as the result of such proceedings.

XVII

No opportunity was given to plaintiffs to maintain their rights or to present appropriate protests and

defenses to the institution of two competing through-line operations between San Francisco and Portland.

XVIII

Since October 29, 1940, great changes have occurred in the fields of transportation in the area affected by the proposed operation.

Now, therefore, based upon the record and files herein, the foregoing findings of fact and the law of the case, the court now makes and enters the following as its

CONCLUSIONS OF LAW

I

This court has jurisdiction of the cause and of the parties.

II

That plaintiffs were deprived of a fair trial before the Commission.

III

The failure of the Commission to make findings as to the ability of Consolidated to operate a through-line in competition with O.-N.-C. and in competition with the plaintiffs is a material jurisdictional defect.

IV

The failure of the Commission to consider the public interest, as opposed to the convenience and necessity of Consolidated and O.-N.-C. is a material jurisdictional defect.

V

The court has power to suspend the Commission's order and the Certificates of Public Convenience and Necessity issued thereunder, and to remand the cause to the Commission for rehearing.

VI

The Commission's order, dated March 1, 1943, and the Certificates of Public Convenience and Necessity issued to Consolidated and O.-N.-C. thereunder should be suspended and the matter remanded to the Interstate Commerce Commission for rehearing.

Dated this 5th day of February, 1945.

(Sgd.) CURTIS D. WILBUR,
Circuit Judge.

JAMES ALGER FEE,
District Judge.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed: Filed February 6, 1945.]

In the District Court of the United States
for the District of Oregon

No. Civil 2340

PIERCE AUTO FREIGHT LINES, INC., A CORPORATION; LOS ANGELES-SEATTLE MOTOR EXPRESS, A CORPORATION; ANGELO COLLETTI, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF COLLETTI FAST FREIGHT: PACIFIC MOTOR TRUCKING COMPANY, A CORPORATION; AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

INTERSTATE COMMERCE COMMISSION; CONSOLIDATED FREIGHTWAYS, INC., AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., INTERVENERS

DECREE

This cause came on to be heard on the 28th day of April 1944, before the Honorable Curtis D. Wilbur, Circuit Judge, the Honorable James Alger Fee, District Judge, and the Honorable Claude McColloch, District Judge, and was argued by counsel. Thereafter said Court, so constituted, made and rendered its Findings of Fact and Conclusions of Law in said cause and said findings and conclusions so made having been entered of record herein;

Now upon consideration thereof, it appearing that on the 19th day of April, 1943, the Interstate Commerce Commission made and rendered its order in causes then and there pending before said Interstate

Commerce Commission, said causes being entitled and bearing Docket Numbers as follows: Consolidated Freightways, Inc.—Extension, Klamath Falls, Oregon, MC–42487 (Sub–No. 15), Consolidated Freightways, Inc.—Extension, Lakeview, MC–42487 (Sub–No. 18), Consolidated Freightways, Inc.—Extension, Marshfield, MC–42487 (Sub–No. 19), Consolidated Freightways, Inc.—Extension, MC–42487 (Sub–No. 20) and Oregon-Nevada-California Fast Freight, Inc., Extension–Portland, MC–9115 (Sub–No. 1), by which order Consolidated Freightways, Inc. and Oregon-Nevada-California Fast Freight, Inc. were authorized to conduct certain common carrier operations by motor vehicle in interstate and foreign commerce; and

It further appearing that thereafter and on the 7th day of September 1943, there was issued to Consolidated Freightways, Inc. a certain Certificate of Public Convenience and Necessity, and thereafter and on the 15th day of September 1943, there was issued to Oregon-Nevada-California Fast Freight, Inc. a certain Certificate of Public Convenience and Necessity, which said Certificates of Public Convenience and Necessity covered the same operations authorized by the Interstate Commerce Commission in its said order of April 19, 1943; and

It appearing to the Court that the order of the said Interstate Commerce Commission of April 19, 1943, was and is unlawful and void;

Now, therefore, it is ordered, adjudged, and decreed that said order of said Interstate Commerce

Commission of April 19, 1943, and said Certificate of Public Convenience and Necessity issued to Consolidated Freightways, Inc. under date of September 7th, 1943, and said Certificate of Public Convenience and Necessity issued to Oregon-Nevada-California Fast Freight, Inc. under date of September 15th, 1943, be and each thereof hereby is suspended.

It is further ordered, adjudged, and decreed that said proceedings, to wit, Consolidated Freightways, Inc.—Extension, Klamath Falls, Oregon, MC–42487 (Sub–No. 15), Consolidated Freightways, Inc.—Extension, Lakeview, MC–42487 (Sub–No. 18), Consolidated Freightways, Inc.—Extension, Marshfield, MC–42487 (Sub–No. 19), Consolidated Freightways, Inc.—Extension, MC–42487 (Sub–No. 20) and Oregon-Nevada-California Fast Freight, Inc., Extension—Portland, MC–9115 (Sub–No. 1), on which said order of the Interstate Commerce Commission dated April 19, 1943, was entered by the Interstate Commerce Commission, be remanded to and stand for further hearing before said Commission.

It is further ordered, adjudged, and decreed that the suspension of said order of the Interstate Commerce Commission dated April 19, 1943, be and remain in full force and effect until the Interstate Commerce Commission on rehearing shall have taken the action designated to be taken by it in the

opinion of this Court dated, entered and filed in this cause on September 20, 1944.

Dated this 5th day of February, 1945.

(Sgd.) CURTIS D. WILBUR,
Circuit Judge.

(Sgd.) JAMES ALGER FEE,
District Judge.

(Sgd.) CLAUDE McCOLLOCH,
District Judge.

[Endorsed: Filed February 6, 1945.]

(Filed Feb. 16, 1945)

In the District Court of the United States for the District of Oregon

No. Civil 2340

PIERCE AUTO FREIGHT LINES, INC., A CORPORATION; LOS ANGELES-SEATTLE MOTOR EXPRESS, A CORPORATION; ANGELO COLLETTI, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF COLLETTI FAST FREIGHT; PACIFIC MOTOR TRUCKING COMPANY, A CORPORATION; AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

INTERSTATE COMMERCE COMMISSION; CONSOLIDATED FREIGHTWAYS, INC.; AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., INTERVENERS

ORDER STAYING EFFECT OF DECREE PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Defendant United States of America and interveners Interstate Commerce Commission, Consolidated Freightways, Inc., and Oregon-Nevada-Cali-

fornia Fast Freight, Inc., have petitioned for a stay of the effect of this Court's decree, entered herein February 6, 1945, pending their appeal to the Supreme Court of the United States, and the Court having considered the said petition and having authority, within its discretion, to stay its decree, and defendants having indicated their purpose to perfect such appeal within the time allowed by law, and it appearing that such stay is necessary to preserve the status quo of the subject matter involved in this suit and that irreparable damage to interveners and disruption of existing public common carrier services would otherwise result, and it appearing that plaintiffs herein have filed a written statement with this Court expressing themselves as being not opposed to the grant of such a stay pending appeal, and the Court having decided to grant defendant's petition for said stay, now, therefore,

It is ordered that the decree of this Court, entered in this suit February 6, 1945, suspending Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission to interveners under dates September 7th and 15th, 1943, be stayed pending appeal to the Supreme Court of the United States and pending final decision upon said appeal by said Supreme Court, this stay being conditioned, however, upon the filing and perfecting of such appeal from the decree herein within the time allowed by law and the rules of the Supreme Court, and, in the event that such appeal is not taken with the time so

allowed, then, upon the expiration of such appeal period, the said decree of February 6, 1945, shall immediately take effect.

Dated this 15th day of February, 1945.

CURTIS D. WILBUR,
United States Circuit Judge.

CLAUDE MCCOLLOCH,
United States District Judge.

JAMES ALGER FEE,
United States District Judge.

[Endorsed: Filed Feb. 21, 1945.]

U. S. GOVERNMENT PRINTING OFFICE